

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:
VITAMINS ANTITRUST LITIGATION

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) Misc. No. 99-197 (TFH)

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This Document Relates To:
Basic Drugs, Inc. v. BASF Aktiengesellschaft,
et al.

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FILED

MAR 19 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Pending before the Court are defendants' Motions to Dismiss¹ plaintiff Basic Drugs, Inc.'s ("plaintiff" or "Basic Drugs") Complaint and plaintiff's Motion to Certify a Question of Law to the Ohio Supreme Court. Upon careful consideration of defendants' Motions, plaintiff's opposition and Motion to Certify, defendants' joint opposition to the Motion to Certify and in reply to plaintiff's opposition to their Motions to Dismiss, and the entire record herein, this Court will grant the Motions to Dismiss and deny the Motion to Certify.

I. BACKGROUND

Plaintiff filed suit under the Ohio Valentine Act ("Valentine Act"), Ohio Rev. Code Ann. § 1331.01 *et seq.*, against the above named defendants, alleging that defendants entered into illegal agreements and conspired to allocate markets, rig bids, and fix prices for vitamin products. *See* Compl. ¶¶ 5, 50. Plaintiff claims that defendants' actions to restrain trade and fix prices of vitamin products constitute a *per se* violation of the Valentine Act and caused plaintiff to pay more for vitamins, because plaintiff purchased vitamins from manufacturers and others

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The defendants who have filed Motions to Dismiss include Lonza, Inc., BASF Corporation, Chinook Group, Inc., Daiichi Pharmaceutical Corporation, DuCoa L.P., DCV, Inc., Eisai U.S.A., Inc., Hoffman-La Roche, Inc., Roche Vitamins, Inc., EM Industries, Inc., Rhone-Poulenc, Inc., Rhone-Poulenc Animal Nutrition, Inc., and Takeda Vitamin & Food USA, Inc.

who, in turn, purchased vitamin products directly from defendants. Id. at ¶¶ 61, 63-65.

Plaintiff's Complaint contains a single claim for violation of the Valentine Act and requests both damages and injunctive relief. Id. at ¶¶ 62-65 and Prayer for Relief at 31.

II. DISCUSSION

Defendants have moved to dismiss plaintiff's Complaint for lack of standing.² Plaintiff has filed a Motion to Certify the question of state law raised by defendants' Motions to the Ohio Supreme Court. Defendants have opposed this Motion to Certify.

A. Defendants' Motions To Dismiss

It is well-established that Ohio's Valentine Act was modeled after the Sherman Act. See, e.g., C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp., 63 Ohio St. 2d 201, 204, 407 N.E.2d 507, 509 (1980) (stating that the Valentine Act was patterned after the Sherman Act and should thus be interpreted accordingly); Pacific Great Lakes Corp. v. Bessemer & Lake Erie R.R., 130 Ohio App.3d 477, 720 N.E.2d 312, 313-14 (Ohio Ct. App. 1996) ("The Valentine Act was modeled after the Sherman Antitrust Act . . . and the Supreme Court of Ohio has interpreted the statutory language in light of federal judicial construction of the Sherman Act"); Acme Wrecking Co., Inc. v. O'Rourke Constr. Co., No. C-930856, 1995 WL 84188 (Ohio Ct. App. March 1, 1995) (interpreting the Valentine Act in light of federal judicial construction of Section 1 of the Sherman Act and Section 4 of the Clayton Act and dismissing plaintiff's claim for relief under the Ohio antitrust laws); Englander Motors, Inc. v. Ford Motor Co., 186 F. Supp. 82, 86 (N.D.

² Several individual defendants also argued for dismissal based upon alternative grounds, such as failure to adequately plead fraudulent concealment and insufficient service of process. Because the Court finds that dismissal is appropriate due to lack of standing, the Court need not address these alternative grounds for dismissal.

Ohio 1960), aff'd in relevant part 293 F.2d 802 (6th Cir. 1961) (recognizing that the Valentine Act parallels Section 4 of the Clayton Act). Accordingly, the Ohio Supreme Court and numerous lower courts have construed the Valentine Act in a manner consistent with federal judicial construction of the Sherman Act and Section 4 of the Clayton Act.³ Id. Therefore, since the Supreme Court has limited damage recovery under Section 4 of the Clayton Act to direct customers of parties engaged in price-fixing, see Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), recovery under the Valentine Act should also be limited to direct purchasers absent contrary language in the statute or evidence of a different legislative intent.

Following this line of reasoning, the Court has previously interpreted the Valentine Act to bar recovery on behalf of indirect purchasers. See Federal Trade Commission v. Mylan Laboratories, Inc., 62 F. Supp. 2d 25, 50 (D.D.C. 1999) (granting motions to dismiss indirect claims under the Valentine Act, because the Valentine Act “does not provide relief to indirect purchasers”), aff'd in relevant part 99 F. Supp. 2d 1, 8 (D.D.C. 1999) (“Mylan Labs II”) (declining to reinstate indirect purchaser damage claims under Valentine Act, because “it is not clear that the Attorney General is entitled to remedies beyond those generally available to private parties”). Moreover, the Sixth Circuit has also precluded indirect purchaser recovery under the Valentine Act. See Pinney Dock Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445 (6th Cir. 1988) (holding that a competitor who has been indirectly harmed by the acts of a defendant does not have standing to bring a claim for damages under either the federal antitrust laws or the

³ Section 4 of the Clayton Act replaced Section 7 of the Sherman Act, which similarly had granted private parties the right to sue for treble damages for violations of the federal antitrust laws. Section 1331.08 of the Ohio Revised Code is substantially similar to Section 4 of the Clayton Act and Section 7 of the Sherman Act, upon which section 1331.08 was modeled.

Valentine Act). Plaintiff has cited no Valentine Act or other Ohio authority for its position that the Valentine Act allows recovery of indirect claims; instead, plaintiff has merely cited two out-of-state decisions of intermediate courts in North Carolina and Tennessee, which appear to have permitted indirect purchaser antitrust claims under those state statutes even in the absence of contrary statutory language repealing Illinois Brick. See Pl's Mem. at 9 (discussing Hyde v. Abbott Labs, Inc., 473 S.E.2d 680 (N.C. App. 1996), and Blake v. Abbott Labs, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,369, 1996 WL 134947 (Tenn. App. March 27, 1996)). However, Hyde and Blake were cited to this Court during the Mylan Labs litigation, and the Court found these two cases unpersuasive on Ohio law questions. Despite plaintiff's contention that these cases show a likelihood that Illinois Brick would be rejected by the Ohio Supreme Court and that the Valentine Act would be interpreted to allow indirect purchaser recovery, the fact remains that "the majority of state appellate courts faced with this same issue have decided to follow the Illinois Brick road." Free v. Abbott Labs, Inc., 176 F.3d 298, 301 (5th Cir. 1999) (citing collection of cases), aff'd on other grounds, 120 S. Ct. 1578 (2000). Therefore, the Court finds that, due to the lack of any contrary statutory language or evidence of divergent legislative intent, the Valentine Act should be interpreted in light of Illinois Brick to bar recovery of indirect purchaser damage claims.

In addition to plaintiff's lack of standing to pursue damage claims under the Valentine Act, plaintiff's demand for injunctive relief is equally ill-founded. The Valentine Act does not grant private parties the right to sue to enjoin violations of the Ohio antitrust laws. See Smith v. The Peoples Gas Light Co., 22 N.S. 228, 230 (Cuyahoga Cir. Ct. 1909) (refusing to grant a private party standing to enjoin a violation of the Valentine Act). Accordingly, since the Valentine Act created a new right to sue for damages for violations of Ohio antitrust law but did

not grant private parties the right to institute proceedings for injunctive relief and since the remedies provided for in the Valentine Act are exclusive, plaintiff lacks standing to pursue its claim for injunctive relief in this case. See Fletcher v. Coney Island, Inc., 165 Ohio St. 150, 154, 134 N.E.2d 371, 374 (1956) (“Where the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional remedy”).

B. Plaintiff’s Motion to Certify

Plaintiff has asked this Court to certify the following question to the Ohio Supreme Court: “Does the purchaser of a commodity have standing to file suit under Ohio Rev. Code Section 1331.08 against a defendant who engaged in illegal price-fixing, when the purchaser received the commodity from the defendant indirectly through another party?”

Questions should be certified to the state supreme court only when the “relevant sources of state law available” fail to “provide a discernible path for the court to follow.” Tidler v. Eli Lilly & Co., 851 F.2d 418, 426 (D.C. Cir. 1988). As this Circuit has explained:

The decision of a federal court to certify questions of law, . . . rests with the sound discretion of the court. The most important consideration guiding the exercise of this discretion, which happens to be embodied in both the relevant statutes as well, is whether the reviewing court finds itself genuinely uncertain about a question of state law that is vital to a correct disposition of the case before it. . . . Where the applicable state law is clear, certification is inappropriate; it is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow.

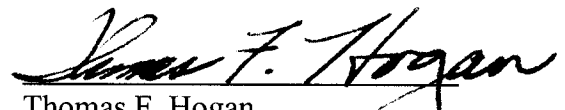
Id. Since this Court finds that Ohio law provides an easily discernible path to follow, this Court finds no basis for certification in this case.

The Ohio Supreme Court, since its earliest decisions construing the Valentine Act, has consistently directed courts to look to federal antitrust decisions for guidance. See, e.g., State ex rel. Monnett v. Buckeye Pipe Line Co., 56 N.E. 464, 467-68 (Ohio 1900); List v. Burley Tobacco Growers' Co-op Ass'n, 151 N.E. 471, 475 (Ohio 1926); C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp., 407 N.E.2d 507, 509-10 (Ohio 1980). Moreover, Ohio state courts have repeatedly relied upon the Ohio Supreme Court's admonition to follow federal judicial precedent when construing the Valentine Act. See, e.g., Pacific Great Lakes Corp. v. Bessemer & L.E.R.R., 720 N.E.2d 551, 562-65 n.7 (Ohio App. 1998); Lee v. United Church Homes, 686 N.E.2d 288, 291 (Ohio App. 1996); Schweizer v. Riverside Methodist Hosp., 671 N.E.2d 312, 315 (Ohio App. 1996). Finally, this Court has previously considered this issue, in light of all relevant statutory and judicial authorities, and has ruled that indirect purchasers lack standing to recover under the Valentine Act. This Court has already rejected, in its Mylan Labs decision, plaintiff's contention that California v. ARC America Corp., 490 U.S. 93 (1989), diminishes the persuasive authority of Illinois Brick. See Mylan Labs II, 99 F. Supp. 2d at 4. Not only has plaintiff failed to cite a single case actually construing the Valentine Act to permit indirect purchaser recovery, plaintiff has cited no authority that even implies that the Ohio Supreme Court would depart from its long history of adherence to federal precedent when construing this statute. Therefore, a discernible path is clear, this Court is not genuinely uncertain about this issue of state law, and certification is unwarranted in this case. Accordingly, plaintiff's Motion for Certification is denied.

III. CONCLUSION

For the foregoing reasons, defendants' Motions to Dismiss for lack of standing are granted and plaintiff's Motion for Certification is denied. An order will accompany this Opinion.

March ¹⁶~~19~~, 2001


Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ORDER

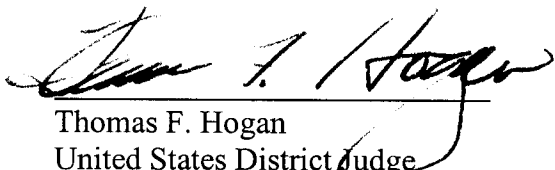
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' Motions to Dismiss¹ plaintiff Basic Drugs, Inc.'s
("plaintiff" or "Basic Drugs") Complaint are **GRANTED**. It is further hereby

ORDERED that plaintiff's Motion to Certify a Question of Law to the Ohio Supreme
Court is **DENIED**.

March 19, 2001


Thomas F. Hogan
United States District Judge

¹ The defendants who have filed Motions to Dismiss include Lonza, Inc., BASF Corporation, Chinook Group, Inc., Daiichi Pharmaceutical Corporation, DuCoa L.P., DCV, Inc., Eisai U.S.A., Inc., Hoffman-La Roche, Inc., Roche Vitamins, Inc., EM Industries, Inc., Rhone-Poulenc, Inc., Rhone-Poulenc Animal Nutrition, Inc., and Takeda Vitamin & Food USA, Inc.

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